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Civil No. 8276

**IN THE SUPREME COURT
of the
STATE OF UTAH**

JEANNE ALEXINE JENKINS,
Plaintiff and Respondent,

— vs. —

JOHN ALLEN JENKINS and
VERONICA JENKINS,
Defendants and Appellants.

**BRIEF OF APPELLANTS JOHN ALLEN JENKINS
and VERONICA JENKINS**

**Appeal from the District Court of the Third Judicial
District in and for the County of Salt Lake**

HONORABLE LEWIS JONES, *Judge*

**GUSTIN, RICHARDS & MATTSSON
and FRED H. EVANS**

*Attorneys for Defendants and
Appellants*

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APPELLANTS' BRIEF

This is an appeal from an order granting a writ of habeas corpus and giving custody of Theodore Scott Jenkins, age 7, and Mia Jenkins, age 4, to the plaintiff. The plaintiff is the mother and the defendant John Allen Jenkins is the father of the two children. Veronica Jenkins, the present wife of John, is only a nominal party. Any further reference to the appellants, unless otherwise expressly indicated, will be to the defendant John Allen Jenkins.

STATEMENT OF FACTS

The record is silent as to the marital background of the plaintiff and defendant. This chapter in the lives of the respective parties involves the question as to what is for the best interests of their two children presently within the State of Utah and in the custody of the father. On May 6, 1954 there was issued a writ of habeas corpus (Tr. 7) pursuant to plaintiff's complaint (Tr. 1-6) requiring that the children be produced before the court to be dealt with according to law. The complaint pleads an interlocutory judgment of divorce dated March 9, 1953 by the California court awarding the divorce and custody of the children to plaintiff, except that the defendant has the right of custody during one calendar month of the year (Tr. 4). The final decree under California law was entered on March 9, 1954 at the instance of defendant confirming the provisions of the interlocutory decree (Tr. 6).

By paragraph 5 of the complaint (Tr. 2) plaintiff alleges:

“That in accordance with the terms of said interlocutory decree and *by reason of the illness of the plaintiff at the time, the defendant, John Allen Jenkins, on or about the 5th day of May, 1953 was given custody of said minor children by the plaintiff*, it being the intention of the parties at that time that such custody by the defendant, John Allen Jenkins, would be temporary and that upon the recovery of plaintiff from her illness defendant would return said children to her.” (Emphasis added)

Defendant by his answer (Tr. 10) alleges that on May 5, 1953 the children, at the instance and request of plaintiff, were given to him to care for and have been cared for by him since said time; that at the time the children were given in his custody plaintiff was ill, emotionally upset and unable to properly care for the children, and plaintiff has been under the care of doctors at different periods during the whole of said time; that there was no agreement or understanding between plaintiff and the defendant that the children would be returned to plaintiff at any particular time or at all. There is the further allegation by way of answer that at the present time plaintiff is emotionally unstable and not in a proper physical or mental condition to care for the children; that it would be for the best interests and welfare of the children that they remain in the custody of their father, who is a fit and proper person to care for the children and who has a suitable home for their needs, protection and care.

The trial court found (Tr. 50) that the plaintiff and the defendants are equally fit and proper persons to have the care, custody and control of the children and that the home of each of them is a proper environment in which to raise the children. There was no finding as to what might be to the best interests of the children, except that it is specifically found (Tr. 50) that the minor child, Theodore Scott Jenkins, is presently enrolled at the Uintah School (Salt Lake City) in the first grade thereof and should remain in school until such time as the plaintiff

“is entitled to return to California as provided in the order of the court to be hereafter made.” The order referred to (Tr. 52) provides that the plaintiff shall not remove the children from the State of Utah until the time specified in the order and not then if the Supreme Court of the State of Utah or any Justice thereof orders otherwise. Prior to the time indicated a Justice of this Court ordered that the children be forthwith placed with and remain in the custody of the defendant during the determination of this appeal and that neither the plaintiff nor the defendants shall remove or permit the removal of the children from the State of Utah during the pendency of this appeal.

The stay thus granted was consistent with counsel’s statement at the trial to the effect that the plaintiff would not enter into a stipulation of any nature that the children remain here, and that she was employed “down there” (California) and could not reside temporarily in the State of Utah and keep the boy in school in this State during the appeal (Tr. 68). Counsel further indicated that he had prepared an order granting plaintiff the immediate return of the children and allowing her to take them to California (Tr. 73). This the trial court resolved by saying (Tr. 80) :

“In other words, if somebody grants a stay, then she’ll either have to stay here and take care of the children, or else she’ll have to let the father take them back out there pending the appeal.”

When the action was called for trial in June 1954 the trial court invited a statement of the parties in the nature of a pretrial.

“I think I’ll require a statement of the theory of the parties, in the nature of a pretrial, before we commence, because this may or may not be able to be settled. I don’t mean ultimately settled, but the matter of why the parties are here rather than down in the Superior Court of San Diego County is a very pressing thing to the court. Irregardless of *Cook v. Cook* and other cases, I’d like to discuss the law before we take any evidence. I don’t mean by that that we can settle the matter, but we might hurdle something.” (Tr. 21)

Pages 21 through 45 of the record on appeal disclose what is termed by the minute entry of June 22, 1954 (Tr. 16) as “pretrial statements” and “oral stipulation” of counsel, the minute entry indicating that upon such oral stipulation and pretrial statements the hearing was continued without date pending the filing by the defendants within ten days of a petition to modify the decree of divorce in the Superior Court of San Diego County, California, the defendant agreeing to submit himself to such jurisdiction. The minute entry concludes :

“The Court further retains the temporary custody of the two minor children, pending an order issuing from the Superior Court of San Diego, California awarding the custody of the children to either party, at which time this Court will order the custody of the children in whomever the Superior Court of San Diego, California directs.”

At the June hearing no inquiry was made as to what might be for the best interests of the children nor were any witnesses examined. Among the statements in the nature of pretrial at the June hearing were the following:

Plaintiff contends that she has recovered from the illness alleged in her complaint (Tr. 26); plaintiff is a resident of San Francisco, California (Tr. 28); defendant was ready to show that on the 5th day of May, 1953, plaintiff suffered an accident, she fell two stories from the roof of a building, she didn't know what she was doing on the roof, she doesn't know whether she jumped or whether she fell but, nevertheless, she stayed in the hospital a number of weeks with a broken back; just prior to that time she was in a hospital under psychiatric observation, it being defendant's contention that plaintiff was prematurely released from the hospital; the matters proposed to be shown by defendant have developed since the California interlocutory decree of divorce, were latent at the time of that decree and never came to the attention of the California court, and it is defendant's theory that in this kind of a proceeding those matters can be shown in the determination of what is to the best interests of the children (Tr. 34); the defendant is a Lieutenant in the Navy (Tr. 41), a part time instructor at the University and lives in Salt Lake City with his present wife, likewise the place of residence of the defendant's mother (Tr. 42).

In the course of the June proceedings, and to adapt the situation to previous expressions of this Court, considerable was said about preserving the status quo in the event of an appeal, even though the proceedings were in the nature of habeas corpus (Tr. 30-36).

“THE COURT: Then to see if I can summarize this, the parties appear and make a pretrial statement and stipulate the matter may be continued, the court to retain jurisdiction of the children until such time as an order is obtained by either party. That is, a new order from the Superior Court of San Diego. That order could be either an order denying a petition to modify or granting a petition. And at that time, upon being advised of the action of the Superior Court of San Diego County, this court will then make its written order directing — or granting the writ if you prevail down in San Diego, and denying the writ if you prevail, Mr. Gustin. Is that the understanding now, so that the parties won’t have to come back?

MR. INGEBRETSEN: And do I understand there will be no appeal from that?

THE COURT: Oh, down there, I don’t know anything about that.

MR. INGEBRETSEN: I presume that order will be an appealable order—

THE COURT: Oh, it will be, but you’re in effect agreeing to submit yourselves to California. All this court is doing is holding the children temporarily and abiding the decision down there. Certainly there would be the right of an appeal. (Tr. 44)

* * *

MR. INGEBRETSEN: I didn't want to be placed in a position of not going through the trial and hearing and having an adjudication down there and having the court award the custody to the mother—

THE COURT: Once an order is made down there —

MR. INGEBRETSEN: I wanted that understanding.

MR. GUSTIN: That would be the final order. Any final order.

THE COURT: Yes, that's a final order. Of course, there's a right to an appeal down there.

MR. INGEBRETSEN: Yes.

THE COURT: Yes. And technically there's a right to an appeal here, but I don't imagine you'd get very far if you try to appeal here, because I'll retain the temporary custody of the children." (Tr. 45)

A further hearing was had in the instant cause on October 14, 1954 (Tr. 57-85), at which time it was shown that the California court made its findings of fact, conclusions of law and order (Ex. 4), all to the effect that defendant's application for modification was denied and he was ordered to immediately deliver the children to the plaintiff at her home in San Francisco. The defendant, by Exhibit 1 and by Exhibits 2 and 3, showed that he had appealed to the Supreme Court of the State of California from the trial court's order. After evidence of the California proceedings and the statements of counsel the court entered the order appealed from.

Preliminary to evidence of the status of the California proceedings, defendant by his counsel called attention to the stipulations entered into in the June proceedings (Tr. 58) and stated in effect that an appeal having subsequently been taken to the Supreme Court of California the question is whether such an appeal comes within the purview of the stipulation in the sense that, pending that appeal, this matter remain in status quo and the children remain within the jurisdiction of the district court in and for Salt Lake County (Tr. 59).

To avoid any distortion of the so-called stipulation we invite attention to all of the expressions of the trial court and counsel at both the June and October hearings. We believe, however, that our theory of the premise upon which the order in the instant case was entered is pointed out by the following:

“MR. GUSTIN: Now I’m wondering if there is any dispute, Mr. Ingebretsen, any question in your mind or the mind of your client but what it would not be detrimental to these children so far as their environment is concerned? I’m speaking of the family and the people that they’re living with, to have them remain here during the pendency of the appeal in California.

I’m ready to put on evidence as to that if counsel requires it. (Tr. 67)

* * *

MR. GUSTIN: I think school opened the first part of September. Now, the children are adjusted to this situation. They’ve been here for practically a year and a half. The environment is wholesome.

I don't think counsel will question that.

THE COURT: Well, all I'm trying to do is to respect and recognize your theory of the case and let you get in the record what you want in, and, if we can, avoid taking testimony. Are you prepared to stipulate the boy is in the first grade in school?

MR. INGEBRETSEN: I'll stipulate that.

THE COURT: And the children, considering their ages, and so on, are adjusted where they're staying. They know where the gate is and the sidewalk, and I guess they know some neighbor kids. That would follow as a matter of course with most children.

MR. INGEBRETSEN: I think so.

THE COURT: That saves putting on testimony in that regard. Is there anything else you would offer to prove?

MR. GUSTIN: I would ask counsel if he would agree with me that the children are in a wholesome, compatible environment at the moment, with Lieutenant Jenkins and his wife and Lieutenant Jenkin's mother.

MR. INGEBRETSEN: I have no evidence to the contrary of that. (Tr. 73-74)

* * *

MR. GUSTIN: * * * Now, the only thing I'm contending for is the California rule: 'A perfected appeal in an action for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as existed at the time of the appeal.' And I'm trying to fit this proceeding into that situation.

THE COURT: All right. Now have we taken care of the record?

MR. GUSTIN: So far as I'm concerned.

THE COURT: All right. Well, in order to shorten it up, let me ask you this question: Why shouldn't the court grant the writ forthwith on the condition that the children remain here with their mother a number of days in order to take care of something that I'm reluctant to foreclose, even though I've said otherwise, and that's an appeal to the Supreme Court of Utah, and a stay by somebody up there? (Tr. 75)

* * *

MR. GUSTIN: I think your Honor has the power to stay this matter at this stage of the proceedings. I personally would find it quite embarrassing to go to the Supreme Court of the State of Utah in view of the stipulation that I made with your Honor.

THE COURT: Well, I don't want to foreclose you from that opportunity, * * *.

* * * I'm willing to go back slightly on what I've indicated in order to give you the chance to go up to the Capitol and ask for that stay." (Tr. 76-77)

By Exhibit 4 it will appear that the California trial court on September 22, 1954, made a finding that it is for the best interests of the minor children that they be in the care, custody and control of their natural mother, the plaintiff. But there is no such finding of the trial court in the instant case. The findings, conclusions and order appealed from are silent as to what is for the best interests of the minor children in the premises.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN NOT EXERCISING ITS PLENARY POWER TO MAINTAIN THE ACTION IN STATUS QUO AT LEAST UNTIL THE CALIFORNIA APPEAL HAS BEEN DETERMINED.

POINT II.

THE COURT ERRED IN GRANTING THE WRIT OF HABEAS CORPUS WITHOUT INQUIRING INTO WHAT IS FOR THE BEST INTERESTS OF THE MINOR CHILDREN IRRESPECTIVE OF THE CALIFORNIA PROCEEDINGS.

POINT III.

THERE BEING NO FINDING AS TO WHAT IS FOR THE BEST INTERESTS OF THE MINOR CHILDREN, THE ORDER GRANTING THE WRIT OF HABEAS CORPUS IS CONTRARY TO LAW.

ARGUMENT

The foregoing points can be properly argued upon the main premise that the best interest and welfare of the children is the controlling factor and is the rule adopted by this Court in child custody cases when not controlled by statute. The rule applies in both habeas corpus proceedings in the district court and proceedings in the juvenile court. *Briggs v. Briggs*, 111 Utah 418, 181 P. 2d 223. Has the rule been applied and followed in the instant case?

1. *If the California proceedings are at all significant the court acted prematurely in granting the writ of habeas corpus.*

At the outset of the hearing in June the court invited discussion as to why the parties were not litigating the question of custody in the California court (Tr. 21). The matters that followed resulted in the hearing being continued without date pending the filing by the defendant of a petition to modify in the Superior Court of San Diego County, California, the court retaining the temporary custody of the children pending an order from that court. The order of the California court, adverse to the defendant, was promptly appealed and the appeal was pending at the time of the October hearing herein. Certainly it would have been to the best interests and welfare of the children under the circumstances, as shown by the record in this case, to await the outcome of the California appeal if the California proceedings were to have any effect, persuasively or otherwise, upon the decision of the court. The children are in a wholesome, compatible environment with the defendant and his wife. Why shuttle the children back and forth between the States of Utah and California, which would be the case theoretically at least, if the decision being appealed from in the latter State is reversed.

In the case of *Ex parte Barr*, 243 P. 2d 787, the Supreme Court of California quotes the California rule as follows:

“ ‘(A) perfected appeal in an action for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of appeal.’ ”

The Court then goes on to state:

“Otherwise, litigants would be encouraged to seize possession of the child pending appeal in the hope that in subsequent habeas corpus proceedings they could persuade an appellate court that their action was in the best interests of the child and that it should ratify their conduct by refusing to issue the writ. As colorfully pointed out in *In re Browning*, supra, 108 Cal. App. 503, 507, 291 P. 650, 651, the child would be ‘in the category of a human football whose possession by either parent depends upon the agility, activity, and determination of each.’ ”

It is to beg the question to say that the trial court, by its conditional order, permitted this Court or one of the Justices thereof to issue a stay and thus preserve the status quo. The district courts of this state are courts having plenary power beyond that, except in matters of original jurisdiction, of the Supreme Court itself. It was the duty of the district court to resolve the issue and if it was going to be controlled by the proceedings in the California court then its duty was to withhold its judgment until the proceedings in that court became final. When the court acted in the instant case there was no “final” judgment of the California court upon the petition for modification initiated pursuant to the stipulation by the defendant.

2. *The best interest issue should have been determined irrespective of the California proceedings.*

The father was given the custody of the children by the mother on May 5, 1953, "in accordance with the terms of said interlocutory decree *and* by reason of the illness of the plaintiff at the time" (Complaint Tr. 2). The plaintiff pleads the fact of her illness by her complaint herein. She alleges that she has recovered from such illness but who is to determine that fact with the children rightfully in the custody of the father and within the jurisdiction of this court? If the illness of the mother was reason enough for her to turn the children over to the father it must certainly follow that there was a recognition on her part of being unable to properly care for and attend them. Who is to be the final arbiter of when the condition ceased which prompted the giving of custody of the children to the father and where is the authority to determine matters of custody of minor children found within the borders of this State? Obviously the answer is the district court of our State and in some instances the juvenile court. The plaintiff by her petition or complaint for the writ of habeas corpus initiated proceedings in our district court, a court of general jurisdiction, and once that was done the court could not delegate its authority to a foreign jurisdiction.

In the *Briggs* case, *supra*, a prior decree of the State of Texas was involved. The decree awarded the custody of the child to the mother and, while this court affirmed

the judgment of the District Court of Utah County awarding the child to the mother on habeas corpus proceedings, it, nevertheless, concluded, independently of the Texas decree, that in view of all of the facts and circumstances presented it was not convinced that the best interests of the child required that the mother be deprived of such custody.

In *Sampsell v. Holt*, 115 Utah 73, 202 P. 2d 550, a Nevada decree was modified by the court below. It was held that the trial court erred in phrasing its decree in such fashion as to amend, or purporting to amend, the Nevada decree, but held the error to be formal only and then proceeded to correct the same without reversing the result or requiring a new trial. As to the contention that full faith and credit was required to be given to the Nevada decree this Court said:

“By the weight of authority it is now well established ‘that in the absence of fraud, or want of jurisdiction, affecting its validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child *at the time and under the circumstances of its rendition*; but that such a decree has no controlling effect in another state as to facts and condition arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child.’ (Italics added) 20 A.L.R. 815. The rule thus stated has been followed in this state. Cooke

v. Cooke, 67 Utah 371, 248 P. 83; 72 A.L.R. 444 note. Later cases on this same point are collected in Goldsmith v. Salkey, 131 Tex. 139, 112 S.W. 2d 165, 116 A.L.R. 1209 and McMillin v. McMillin, 114 Colo. 247, 158 P. 2d 444, 160 A.L.R. 400."

The plaintiff herself pleads a substantial change of circumstances following the entry of the California interlocutory decree. She pleads that she recognized her illness as being sufficient cause for her to voluntarily surrender custody of the children to the defendant. The effect of such change of condition as affecting the best interests of the children must be decided by the courts of this State so long as the children remain in this State and the jurisdiction of such court is invoked. Neither the parties nor the trial court can solve the problem by any half way measure. It would invite the utmost confusion and conflict of laws to have the court of one sovereign state retaining the physical custody of the children and agreeing in advance to abide the outcome of a proceeding in another jurisdiction, particularly when the other jurisdiction does not have the children before it.

3. *The order granting custody to plaintiff is not supported by the findings.*

The court made no finding in connection with its order of October 14, 1954, the order appealed from, as to the best interests of the children in the premises. In the *Briggs* case, *supra*, it is stated:

"Under that construction the mother would be an improper person to have the custody of this child if the welfare and best interest of the child

required that it be reared by its father, and the determining factor would be what, under the surrounding facts and circumstances, would be for the best interest and welfare of the child. That is the rule which we have adopted in child custody cases not covered by this statute. This is true both in habeas corpus proceedings in the district court and proceedings in the juvenile court. *Walton v. Coffman*, Utah, 169 P. 2d 97; *Baldwin v. Nielson*, Utah, 170 P. 2d 179, on rehearing 174 P. 2d 437; *In re Bradley*, Utah, 167 P. 2d 978; *In re Olson*, Utah, 180 P. 2d 210. In the recent case of *Anderson v. Anderson*, Utah, 172 P. 2d 132, although we did not directly refer to or discuss this statute, or the meaning of this term, we applied this rule and took a child from the mother and gave it to its father because we were convinced that the best interest and welfare of the child requires such a change. The facts in that case brought it within the provisions of this section but we took this one child from her notwithstanding the fact that we approved a finding that she was a fit person to have the custody of her children and allowed her to retain the custody of other children of the parties.”

In *Smith v. Smith*, 1 Utah 2d 75, 262 P. 2d 283, this Court said:

“The determining issue here is what will be for the best interest of the child. This is an ultimate question of fact which the trial court found in the mother’s favor. Child custody cases are equitable in nature and so we must review both the law and the facts. Here we have a double problem of determining not only the occurrences and events here involved but the much more un-

certain and controversial problem of trying to look into the future and see the effect on the happiness and well-being of the child each course will bring, and thus determine which course will be for the best interest of the child."

CONCLUSION

Defendant did not invite this appeal. He asked the trial court to permit him to keep the children, who have been with him since May 1953, until the matter is "finally" determined by the California court and suggested that the trial court exercise that power (Tr. 76). If that had been done then, upon the determination of the California appeal, the court might well have taken the California proceedings into consideration in determining what should be done with the children in light of their welfare and best interests, but not having done so the matter is only partially tried as indicated by the fact that there is no finding as to what is for the best interests of the children and their welfare. The custody of the children has been preserved in the father and the status quo maintained, and thus it becomes of substance that this Court reverse the order appealed from and remand the proceedings to the lower court for a determination as to what must be done for the welfare and in the best interests of the children.

Respectfully submitted,

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Appellants*